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Supreme Court of the United States

GULFSTREAM PARK RACING ASSOCIATION, INC., A FLORIDA CORPORATION, APPELLANT,

VS.

ROBERT L. WEED, ARCHITECT, INC., A FLORIDA CORPORATION, APPELLEE.

APPELLEE'S REPLY BRIEF ON MOTION TO DISMISS APPEAL.

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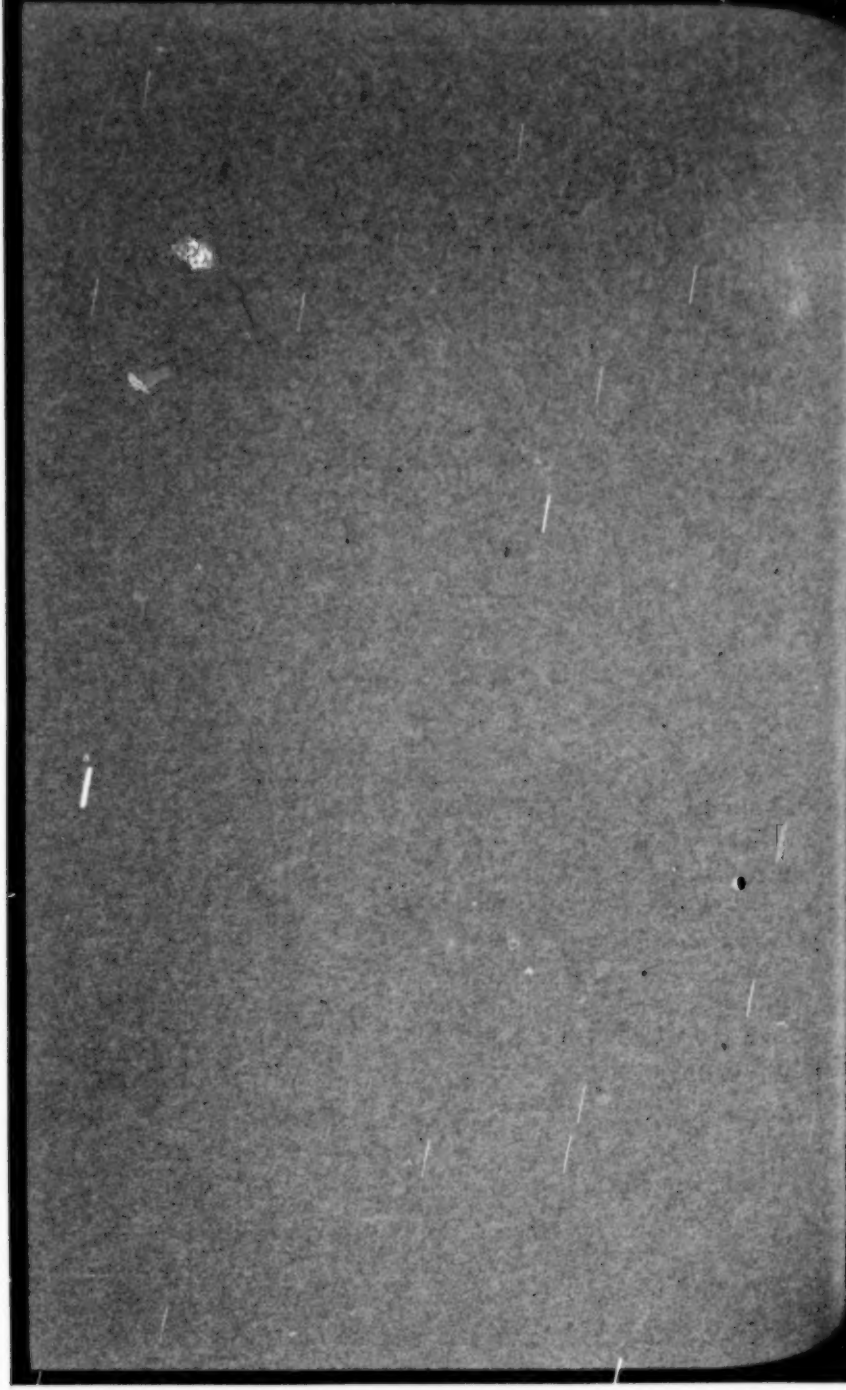

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APPELLEE'S REPLY BRIEF ON MOTION TO DISMISS APPEAL.

HISTORY OF THE CASE.

This is an appeal from a memorandum decision of the Supreme Court of the State of Florida affirming a decree of the Circuit Court of Broward County, Florida, which adjudicated that Robert L. Weed, Architect, Inc., had a mechanic's lien against real estate now owned by Gulfstream Park Racing Association, Inc.

The appellee, whom we shall refer to as Weed, has moved to dismiss the appeal upon the ground that there is no Federal question presented.

The facts out of which the controversy arose are briefly as follows: Some 12 years ago Broward Tomato Farms, Inc., a Florida corporation, leased certain land in

Broward County, Florida, to Hollywood Jockey Club, Inc., also a Florida corporation. The lease required that the lessee should spend not less than $500,000 in the construction of a race track. This provision was a part of the consideration for the lease. Hollywood Jockey Club, Inc., began the erection of a track and in so doing employed Weed as the supervising architect, agreeing to pay him a sum of money equal to 6 per cent of the cost of the track. Weed performed the services and the track was built and opened during the Winter season of 1939.

The track ran for a few days when it suspended operations and filed a petition for reorganization under Chapter X of the Bankruptcy Act, in the United States District Court for the Southern District of Florida. Weed was permitted by a special order of the Court to institute a suit in the Broward County Circuit Court for the purpose of preserving his lien rights, which under applicable Florida statute required the bringing of a suit within a certain time. He was permitted to make the Jockey Club a party defendant, but was enjoined from taking any further steps in the cause after that event was accomplished. Weed complied with the order, and under the injunction the cause was stayed until the subsequent disposition of the reorganization proceedings. In these proceedings, Weed, as he was required to do, filed his claim. The Hollywood Jockey Club opposed the allowance of the claim. Testimony was taken before the Special Master. He reduced the amount of Weed's claim to some $45,000, and upon the matter being heard by the District Judge, the Special Master's finding was confirmed and Weed was adjudicated to have a lien claim against the Hollywood Jockey Club for the amount found by the Special Master.

The reorganization proceedings were unsuccessful and ultimately the Jockey Club was adjudicated a bankrupt.

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The cause was referred to a Referee who happened to be the same person as was the Special Master who had heard the claims in the reorganization proceedings. There was no actual change in the proceedings, but the cause went along as before with the assets of the debtor being administered according to the Bankruptcy Rules. The Referee determined that all previously allowed claims should stand as though they had been filed in the bankruptcy proceedings and acted upon in this cause, and accordingly Weed was allowed a secured claim against the assets of the debtor in the total amount of $45,918.67. The proceedings determining these matters appear as part of the record on file in this Court in a cause entitled *Bragg et al. v. Gerstel*, and can be found at pages 107, 108, 149 and 150 of that record.

In the meantime and long prior to the filing of the reorganization proceedings, Marie M. Horning while the track was in construction acquired the fee simple title to the property involved from Broward Tomato Farms. She gave the seller a mortgage for which she imposed upon herself certain restraints against the alteration of the lease with Hollywood Jockey Club. She also undertook, during the construction of the track, to guarantee the payment of certain purchases of materials which went into the erection of the buildings, and during the subsequent reorganization proceedings she purchased and acquired a substantial part of the claims against the Jockey Club. Her son, John C. Horning, became President of the Hollywood Jockey Club, Inc., and the general contractor in erecting the track. In addition to this, Mrs. Horning and her son acquired a majority of the capital stock of the corporation, and at the time of the bankruptcy adjudication they owned nearly three-fourths of the indebtedness against the Jockey Club.

Mrs. Horning herself participated in many ways in the bankruptcy proceedings. She petitioned for a surrender to her by the Trustee of the real estate involved in this cause, and she consented to the procuring by the Trustee of a racing permit from the State of Florida to conduct race meets on the track.

Finally the Trustee received an offer to purchase the assets of the Hollywood Jockey Club, which consisted of the leasehold assets, $10,000 worth of vehicles, and paraphernalia. The offer was for $100,000 and it was made by one James Donn as Trustee for Gulfstream Park Racing Association, Inc., the appellant here. Shortly after the receipt of Donn's offer, T. E. Bragg made an offer of $600,000, which in terms of dollars and cents, was substantially higher than Donn's, but which required the sale of the assets free of liens. The Referee decided to accept Donn's offer, whereupon a petition for a review was filed with the District Judge and Weed, among others, sought to set aside the Referee's decision upon the ground that the Bragg offer was the better and should be accepted. The District Judge confirmed the Referee's action, whereupon Bragg and Weed appealed to the Circuit Court of Appeals where the District Judge's action was affirmed. The Court held, among other things, that Weed had no standing since his lien rights were not affected by the sale. Gulfstream Park Racing Association was a party to the appellate proceedings and is unquestionably bound by whatever took place in the Court of Appeals. That Court upon the record which is now before this Court, and which was before the Circuit Court of Broward County and the Supreme Court of Florida, held that the Hollywood Jockey Club had erected the track, buildings and equipment at a cost of about a million dollars, and among other things the court said:

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"The contractor who built the race track was a corporation operated by one J. C. Horning. Many of the subcontractors and materialmen required the personal guarantee of Horning and his mother, Mrs. Marie Horning, persons of wealth. Though not original stockholders of the Jockey Club nor interested in the real estate at the time of its lease, the Hornings became interested in the enterprise and bought up a majority of the capital stock, and Mrs. Horning in 1938 purchased the title to the land subject to the lease, thus becoming the landlord. * * *"

And further:

"At the time of the bankruptcy adjudication the Hornings, by taking up the debts they had guaranteed and by purchasing others, owned nearly three-fourths of the indebtedness. * * *

"* * * Mrs. Horning then undertook in connection with Donn to buy up the liens, and to get the trustee to obtain a racing permit and to operate the track. Nothing coming of this, Donn on February 15, 1944, made the trustee a written offer to pay $100,000 in cash for a quitclaim deed to the assets. * * *

"* * * It was plain that unsecured creditors could get nothing under either bid (and the trustee had reported his inability to get any other bids), and the secured creditors would be unaffected (these claims were in fact mostly owned by Donn and Mrs. Horning), so he concluded the Donn bid ought to be accepted. The district court on review reached the same conclusion."

Accordingly, appellant took possession of the property of the bankrupt under a conveyance from the Trustee, which contained this language:

"Also there is hereby transferred and assigned to the said Gulfstream Park Racing Association, Inc., a Florida corporation, all of the Trustee's right, title and interest of whatsoever kind or nature in and to any and

all leases on said properties, wherein the Hollywood Jockey Club, Inc., was the lessee and including specifically assignment of all right, title and interest of Hollywood Jockey Club, Inc., or the Trustee in and to that certain lease originally given by Dade Tomato Farms, Inc., dated the 7th day of August, A. D. 1937, and recorded in Deed Book 299, at Page 8, of the Public Records of Broward County, Florida."

At about the same time Gulfstream Park, for whom James Donn was Trustee, acquired the fee simple title to the property from Mrs. Horning, and the arrangement between the parties was that she was to get one-third of the capital stock of the Gulfstream Park Racing Association, and Donn, who was acting for himself and members of a syndicate, were to get two-thirds. Donn became President of the track and has actively conducted this litigation ever since. He testified in the lower court that he purchased most of the claims against the track for about ten cents on the dollar, and the records of the State Racing Commission, which has jurisdiction over the operation of race tracks in Florida, show that for the season of 1946-47, the appellant's gross receipts amounted to $29,507,761.

The Proceedings in the Florida State Court.

A Florida statute which was in force at the time of the making of the lease, from Broward Tomato Farms to Hollywood Jockey Club, provided in effect that where a lessor required certain improvements to be made by the lessee, the lessor's estate in the land became liable for the value of the improvements. This statute is mainly confirmatory of common law as many courts notably among which was Illinois, had long since held that the lessor's estate became liable under the circumstances set forth in the statute. Pursuant to the sanction of this statute, Weed, again as stated above, sued in the State Court to enforce his lien

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both against the fee simple title and the leasehold. When he was freed from the fetters of the bankruptcy injunction, he amended his complaint to set out the events which had occurred subsequently to the institution of this suit and made Gulfstream Park Racing Association, Inc., a party defendant. The pertinent portions of the bankruptcy proceedings were set forth in the complaint. A motion to dismiss the pleading was filed and granted whereupon Weed appealed, and the Supreme Court of Florida reversed the decree in an opinion in which it said:

> "Throughout the entire transaction, both parties recognized Robert L. Weed as the main party in interest, and that Robert L. Weed, Architect, Inc., was nothing more than a nominal party to the transaction. * * *
>
> "It is hardly open to question that the fee successors to Broward Tomato Farms, Inc., Marie M. Horning and the lessee Hollywood Jockey Club, Inc., had knowledge of appellant's claim. Mrs. Horning in terms accepted it, and the lease was the primary asset bargained for and purchased by the Gulf Stream Park Racing Association, which agreed as part of its condition to purchase, to pay appellant's claim. When such facts are undisputed and it is shown that the claim was examined and approved by the Federal District Court, good authority holds that it is *res judicata* and that defendants are estopped to challenge its validity. *Blanks* v. *West Point Wholesale Grocery Co.*, 225 Ala. 74, 142 So. 49; *Cromwell* v. *County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Carr* v. *Barnes*, 138 Mo. App. 264, 120 S. W. 705; 6 Am. Jur. 590.
>
> "When a lease contract in terms requires valuable improvements, that are the gist of the lease, and the parties to the lease witness them being made, they will not be heard to say that they can contract to prevent laborers and material men from securing a lien on the leasehold which the law in terms gives them. The cautionary notice was not required because the lessor

was dealing directly with the owner or his agent and to have given it would have been a futile gesture."

The cause accordingly was sent back to the Circuit Court and here the appellant filed its answer in which it mainly sought to show that Weed should not be allowed a lien, because he had somehow been involved in promoting the race track. Weed was charged in the answer with having committed a fraud upon Gulfstream Park by reason of the fact that he did not disclose to Hollywood Jockey Club the fact that he was dealing with it as a corporation. From this premise it was argued that Weed, being a director of the corporation, could not assert a claim against it for services rendered. There was utterly no proof of any of these charges, which were apparently designed simply to injure Weed. The record in the case showed that the original contract, between Hollywood Jockey Club and Weed, was made with Robert L. Weed, Architect, Inc., and there was simply no proof whatsoever of concealment on Weed's part. Moreover the defense was one which was certainly personal to Hollywood Jockey Club and could not have been successfully asserted by appellant even if the charges had been true. The Court after the taking of much testimony, entered a final decree adjudicating that Weed had a lien upon the track in the sum of $45,918.67.

There was no proof of any sort offered by the appellant to the effect that Weed was not entitled to this amount of money. Donn, the President of the appellant corporation, admitted that Weed had rendered services in constructing the track. Relevant documents consisting of the lease, the agreement between Hollywood Jockey Club and Weed, and the subsequent transfers of the title were admitted in evidence. Weed was called as a witness on behalf of the appellant and was examined regarding entries in his books, which he was required to produce for examination. Appel-

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lant offered in evidence a printed copy of the transcript of the record on appeal to the United States Circuit Court of Appeals in the cause entitled Bragg versus Gerstel above referred to, and this record showed not only the adjudication of Weed's claim by the District Court, but also showed the cost of the track. Since Weed was employed upon a cost-plus basis, it would have been of course a simple mathematical matter to have figured out what the amount of his claim should have been from this record. Using the figure as to the cost of the track, which the Circuit Court of Appeals used, namely, $1,000,000, it would appear that Weed's claim should have been allowed to the extent of $60,000.

From this decree, Gulfstream Park Racing Association prosecuted an appeal to the Supreme Court of Florida. The decree was affirmed in a memorandum opinion reported in 39 So. 2d 921.

Weed's Contention in the Supreme Court of Florida.

Weed contended, on the appeal to the Supreme Court of Florida, that the District Court sitting in bankruptcy had definitely and finally adjudicated that he was a secured claimant against the Hollywood Jockey Club and that he had a lien upon its assets for the amount awarded him. It was contended that this adjudication was binding upon the bankrupt and upon those claiming under it. It was contended that James Donn, as Trustee for the appellant, who was the purchaser at the bankruptcy sale, was bound by the adjudication of the Bankruptcy Court as to Weed's status and the amount of his claim, and that as to the leasehold estate the extent, nature and amount of Weed's claim was not subject to re-examination in any other Court.

As to the fee simple title, it was contended first that Mrs. Horning, who was Gulfstream Park's predecessor in

title and with whom a privity in estate existed, actively participated in the bankruptcy proceedings, and that her connection with the bankruptcy was so close and intimate that she was necessarily bound by the adjudication also. Indeed the District Judge expressed the opinion, though he did not carry his thoughts into effect, that Mrs. Horning's estate was subject to being administered in the Bankruptcy Court by reason of her connection with the matter.

The second contention was that with the amount of the claim concluded, it remained only for the Supreme Court of Florida to decide whether or not the lessor's estate was liable, pursuant to Section 84.03, F. S. A. (1941), which provides as follows:

> "When an improvement is made by a lessee, in accordance with a contract between such lessee and his lessor, liens shall extend also to the interest of such lessor."

It was next Weed's contention that in any event and regardless of the extent of the adjudication in the Bankruptcy Court as to the fee simple title, that a merger of the two estates in the land had taken place when Gulfstream Park Racing Association acquired both the leasehold estate and the fee simple title, and that the effect of this merger at common law was to make the greater estate liable for the adjudicated claims against the lesser.

This position was warmly advocated at the bar of the Supreme Court of Florida and it was commented upon by one of the Justices during oral argument. Since it affords a complete and ample basis for the support of that Court's opinion, it is reasonable to assume that the judgment of that Court rested upon that proposition.

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Appellant's Position.

In its brief in opposition to our motion to dismiss, appellant makes certain factual statements which call for a reply.

First: It says that the Trustee in Bankruptcy did not sell a leasehold estate, because the lease had been canceled.

This statement is contradicted by everything that appears in the record. The bankruptcy had very little else to sell beside the leasehold and the $10,000 worth of vehicles and paraphernalia, mentioned by the Circuit Court of Appeals in the opinion in Bragg versus Gerstel, was certainly not worth $100,000. The Trustee in Bankruptcy conveyed the leasehold estate to appellant, and the Court of Appeals held in the cited case that the leasehold estate had been sold. The Supreme Court of Florida, in its opinion on a prior appeal in this case, held that the lease was a primary asset bargained for and purchased by Gulfstream Park Racing Association, which agreed as part of its contract to purchase to pay the appellant's claim.

Second: It says that the District Court specifically held that it was not adjudicating the claim and had never taken jurisdiction so to do. It is also said that Weed's claim was allowed as a secured claim and not a lien claim. In the Court of Appeals, the Gulfstream Park Racing Association took the position that Weed had no right to appeal from the decree confirming the sale of the assets because it was a secured creditor, and its rights could not be affected by the sale, and in agreeing to this position the Court said Weed "is a lien creditor whose lien is not affected by the sale and who, it is argued, has no reason to appeal." It is a fact that in the order of adjudication, which was dated August 13, 1942, and which appears in the Bragg record at page 146, the Court said that "no interested party is precluded by virtue of this order from raising such question

in any subsequent proceedings herein or otherwise," as quoted in appellant's brief. This language, however, was used by the Court as a means of inviting the parties to proceed against the fee simple title. The pertinent portion of the order of which the above quotation is a part is that "the Court does not at this time make any determination or adjudication of the question whether or not the Bankruptcy Court has jurisdiction to try, determine, adjudicate or enforce any alleged mechanic's and building lien or claim or any other kind of alleged lien or claim against the fee simple estate in the property leased to the bankrupt by said lease." Then follows the part of the order which appellant quoted.

However, this language must be understood in the light of the Court's announced views in regard to the entry of this proposed order, which appear in the transcript at page 138. These views are set forth at page 145 of the record and are as follows:

> "That the bankruptcy be referred to L. Earl Curry as Referee, with directions that the proceedings be conducted, so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this Chapter was filed, and as if a decree of adjudication had been entered at the time when the petition under this Chapter was approved."

Third: Appellant states that the purchaser, James Donn never acquired the fee simple title. This quibbling is typical of appellant's entire case as shown by its unsupported charges that Weed had practiced a fraud on Hollywood Jockey Club. The fact is that Donn purchased the leasehold estate as Trustee for Gulfstream Park Racing Association, which likewise acquired the fee simple title Appellant then claims that the lease had actually been

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canceled not only by the action of the United States District Court, but actually canceled of record. It then says there never was any merger.

These statements are not true. The cancellation of the lease, if it in fact was canceled, was not in the record. In any event the parties could not make a separate agreement that would operate to defeat Weed's claim. The District Court did not cancel the lease. Mrs. Horning took the position in the District Court, that she was entitled to the leased premises being surrendered to her, because of an alleged failure on the part of the Trustee to accept the lease within the time required by the Bankruptcy Act. Her position was never determined by the District Court, but in any event Weed was a secured claimant and he was not represented by the Trustee, and the latter's inaction could not have prejudiced Weed's claim. If it could have, Appellant has played fast and loose with the Court, because this is exactly contrary to the position which it took in the Court of Appeals. Regardless of this, however, the question of the merger is a common law proposition and presents no Federal question. The decision of the Supreme Court of Florida on that point would be binding on this Court.

Fourth: Appellant next says that the Supreme Court of Florida rendered an opinion based upon an erroneous assumption of fact. It would be a novel matter for the Supreme Court of the United States to reverse decisions of State Supreme Courts, because they were based upon an erroneous assumption of facts. Appellant is bound by the record in the Circuit Court of Broward County and the Supreme Court of Florida and only in a direct proceeding in the latter Court can statements of fact, which are allegedly erroneous be corrected. Certainly, this Court will

not assume that the Supreme Court of Florida has distorted the record. Under this heading Appellant also says that no opportunity has ever been offered to it to test the validity or truthfulness of the facts alleged in the Bill of Complaint. The fact of the matter is that during the proceedings in the Circuit Court of Broward County prior to the entry of the decree appealed from, the Appellant called Weed as a witness and attempted to interrogate him upon the services which he had rendered in the construction of the race track. Weed's counsel objected, upon the ground that the Supreme Court of Florida had determined that the District Court had adjudicated Weed's claim. At the conclusion of the argument upon the objection the Court made this announcement:

> "The Court: It is my view that the defendant by the holding of the Supreme Court, is estopped to deny any matters that were ruled upon by the Supreme Court in the opinion cited, but that in order that the Supreme Court may have the whole record before the Court, to rule upon the question raised by the answer, and the proper testimony, I shall overrule the objection and allow the testimony to go in together with any of the exhibits, and the Supreme Court can then review its own findings, if it wants to."

Fifth: Appellant next contends that our statement to the effect that it did not offer any testimony on the issue of the amount or validity of the claim is erroneous, because the order of the Circuit Court of Broward County shows that Appellant was not permitted to take any testimony as to the amount of the claim. This statement is directly refuted by the quotation from the record above given. Indeed the record shows that when the plaintiff rested its case, it announced that it was doing so upon the assumption that the matter had been adjudicated and that the appellant here countered with the statement that Weed had

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no right to indulge in any such assumption. And the Court stated that Weed could not assume that the Court would rule one way or the other. It further appears that of the nearly 100 pages of testimony which were taken before the Circuit Judge, at least two-thirds were consumed in the taking of the appellant's proof. The fact is that appellant was not precluded in offering any testimony.

Sixth: Appellant next says that it complains of three things:

A. That the Florida Lien Statute, regardless of the terms of the contract between the landlord and tenant, gave a lien automatically upon the lessor's interest according to the construction placed upon the statute by the Supreme Court of Florida.

B. That the statute did not make the tenant the agent of the landlord.

C. That it has been denied the opportunity of contesting the validity of the lien in spite of the fact that Weed himself was one of the promotors of the corporation and did not give the cautionary notice required by the State Law.

The State Mechanic's Lien Statute giving the person supplying labor or materials a lien upon the lessor's interest is confirmatory of common law. In *Arctic Lumber Company* v. *Borden*, 211 Fed. 50, certiorari denied 235 U. S. 704, 59 L. Ed. 433, 35 S. Ct. 209, the Court said:

> "(7) It is the general rule that where a lease contains a provision authorizing the lessee to make improvements 'by deducting the cost thereof from the rent, or where part of the consideration of the lease is the making by the lessee of improvements which become a part of the realty, or that the improvements

made by the lessee shall revert to the lessor, a mechanic's lien may attach to the property for work done, or materials furnished, pursuant to a contract with the lessee.' 27 Cyc. 58; *Kremer* v. *Walton*, 16 Wash. 139, 47 Pac. 238; *Shaw* v. *Spencer*, 57 Wash. 587, 107 Pac. 383; *Whitcomb* v. *Gans*, 90 Ark. 469, 119 S. W. 676; *Potter* v. *Conley*, 83 Kan. 676, 112 Pac. 608; *Western Lumber Co.* v. *Merchants' Amusement Co.*, 13 Cal. App. 4, 108 Pac. 891; *Wallinder* v. *Weiss*, 119 Minn. 412, 138 N. W. 417; *Dougherty-Moss Lumber Co.* v. *Churchill*, 114 Mo. App. 578, 90 S. W. 405; *Lumber Co.* v. *Nelson*, 71 Mo. App. 110; *Crandall* v. *Sorg*, 198 Ill. 48, 64 N. E. 769; *Carey-Lombard Lumber Co.* v. *Jones*, 187 Ill. 203, 58 N. E. 347; *Jones* v. *Menke*, 168 N. Y. 61, 60 N. E. 1053."

Many other opinions could be cited to this point contrary to the statement at page 13 of Appellant's brief implying that this is the only case in point. The Supreme Court of Florida in its prior opinion holding that the fee simple title was liable for the lessee's contract and that an agency existed, which obviated the necessity of giving notice, cited two earlier decisions in that jurisdiction.

As to the contention in Paragraph B above, we think we have sufficiently answered this by what we have said under Paragraph A, but if further comment were necessary, appellant's contention would be foreclosed by what the Supreme Court of Florida said on a prior appeal of this case. It said that "the rule appears to be general that when a lease requires the lessee to construct improvements on the leased premises, the lessee thus becomes the owner or the agent of the owner and there is no reason for the notice of the lien." The Supreme Court of Florida has thus determined that within the meaning of the Florida Lien Statute, according to opinions rendered long before the inception of this controversy, Hollywood Jockey Club, Inc., was with respect to persons contracting with it for labor

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and materials to be supplied to the property of Broward Tomato Farms, the owner of the land, and that Broward Tomato Farms had agreed to this agency by entering into the leased contract.

As to the argument under section C above, we do not see where this question is presented by the record. Whether Weed was one of the promotors of the Hollywood Jockey Club is certainly of no moment on this appeal, but it might not be amiss to point out (because it is typical of appellant's entire case) that Weed was not one of the promotors of the track and only owned 50 out of 50,000 shares, and that this certificate representing his ownership was not even in his name on the books of the corporation.

Seventh: Appellant next contends that the Florida statute as construed by the Supreme Court, violates the Federal Constitution in giving a lien on a landlord's property without notice.

This Court has consistently held that an erroneous construction placed on a statute by the highest court of the state is not grounds for appeal.

"In *King* v. *West Virginia*, 216 U. S. 92, 30 S. Ct. 225, 54 L. Ed. 396, Holmes, J., this court held (Hn. 4):

> 'The misconstruction of a state statute by a state court cannot present a question which will sustain a writ of error from the Federal Supreme Court to a state court.' "

"In *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 255 U. S. 455, 41 S. Ct. 373, 66 L. Ed. 723, this court said:

> 'All the assignments and contentions made rest in their last analysis upon the assumption that, despite the construction of the statute made by the court be-

low, it still must be here treated as repugnant to the Constitution because operating the discrimination originally complained of. But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. *Commercial Bank* v. *Buckingham*, 5 How. 317, 342, 12 L. Ed. 169; *Johnson* v. *New York Life Insurance Co.*, 187 U. S. 419, 496, 23 S. Ct. 194, 47 L. Ed. 273; *Ross* v. *Oregon*, 227 U. S. 150, 162, 33 S. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; *Ireland* v. *Woods*, 246 U. S. 323, 330, 38 S. Ct. 319, 62 L. Ed. 745; *Stadelman* v. *Miner*, 246 U. S. 544, 38 S. Ct. 359, 62 L. Ed. 875; *Erie R. R. Co.* v. *Hamilton*, 248 U. S. 369, 371, 372, 39 S. Ct. 95, 63 L. Ed. 307. It is hence obvious that the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous, and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. *Farrell* v. *O'Brien*, 199 U. S. 89, 100, 25 S. Ct. 727, 50 L. Ed. 101; *Goodrich* v. *Ferris*, 214 U. S. 71, 79, 29 S. Ct. 580, 53 L. Ed. 914; *Toop* v. *Ulysses Land Co.*, 237 U. S. 580, 583, 35 S. Ct. 739, 59 L. Ed. 1127; *Sugarman* v. *United States*, 249 U. S. 182, 184, 39 S. Ct. 191, 63 L. Ed. 550; *Berkman* v. *United States*, 250 U. S. 114, 118, 39 S. Ct. 411, 63 L. Ed. 877; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193, 40 S. Ct. 453, 64 L. Ed. 855.' "

However, the statement is not true. The theory underlying the cases with respect to notice is that where the lessor requires the doing of certain work on the premises, he in effect contracts directly with the persons supplying the material and labor, and hence no notice to him would be necessary. It would be a vain and useless thing to give a person notice of a contract that he made, and as pointed out by the District Judge in the Bankruptcy proceedings (Bragg record 145) Mrs. Horning was bound by the conclusion that the improvements, which were required to be

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made on the property, might be made on credit, and that she therefore agreed to the creation of the liens.

Eighth: Appellant next says that the statute is unconstitutional as now construed, because it makes the lessee the agent of the landlord to the extent of representing the latter in Court.

This statement is not supported by anything in this record. No construction of the statute on this point is before this Court on this appeal. The opinion of the Supreme Court, which appellant says construed the statute in this fashion, was rendered in December of 1937, and if it had the effect which appellant gives it, was final and would therefore not be subject to review here at this late date. However, the Supreme Court of Florida has never in any opinion in this case made a holding to the effect that appellant says, and the opinion on the prior appeal can be scanned in vain for any such contention.

Ninth: Appellant next claims that the principle of due process has been violated and the landlord has been denied his day in Court to contest the validity of the claim.

In the first place, the landlord was never denied its day in Court. The record of the proceedings expressly shows that he was given every opportunity to offer evidence on the issues presented.

In the second place, the landlord himself proved the amount of Weed's claim. This is so because the record in the United States Circuit Court of Appeals shows that the books of Hollywood Jockey Club, the agent of appellant's predecessor in title, Broward Tomato Farms, list the total creditors of the corporation being the persons who supplied labor and material to the track, to total $1,227,463.26. Weed was entitled to a fee of 6 per cent of the cost of construction. Thereafter, it appears that Weed had a claim in excess of

the amount allowed him in the District Court, in which case appellant certainly is in no position to complain.

In the third place, we must assume the Florida Supreme Court held a merger of the two estates took place as at common law, with the result that the landlord's title was subject to the adjudicated claim. A case closely in point is Evans against Young.

"*Evans* v. *Young*, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583. In this case one Evans demised certain land and in the lease required the lessee to erect a structure on the premises. The lessee mortgaged the land and constructed the required buildings, leaving, however, unpaid bills for materials furnished therein, for which liens were filed. The mortgage was foreclosed and Evans, the lessor, purchased the land from the purchasee at the foreclosure sale. In affirming a decree holding Evans' fee simple title subject to the liens, the court said:

> "* * * By so uniting the two estates, the lesser estate became extinguished by sinking into the greater estate, leaving the lien resting upon the entire estate, unless the two estates for equitable purposes should be held and treated as being separate and distinct. From the evidence it appears that appellant sold and conveyed the entire estate. Having so done, it may be doubtful if he would thereafter be permitted to treat the leasehold estate and the fee as separate and distinct. *James* v. *Morey*, 2 Cow. 286; *Koenig* v. *Mueller*, 39 Mo. 165.
>
> 'But the two estates, when owned by the same person, are only regarded in equity as separate, when equitable considerations justify or require such action; and since appellant purchased the lease with full knowledge of the lien rights of appellees, and since the leasehold estate was of much greater value than the amount of the lien as evidenced by the sum paid therefor by appellant, we are of the opinion that no equitable con-

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sideration exists requiring us to hold that an absolute merger did not take place. *Smith* v. *Roberts*, 91 N. Y. 476; *Koenig* v. *Mueller, supra.*' "

"36 Am. Jur. (Mechanics Lien) 142, Sec. 219, also reads as follows:

> '* * * In the case of a merger of the estates, as by a purchase of the leasehold by the lessor, if at the time of purchasing the leasehold, the lessor has full knowledge of a mechanic's lien against it, no equitable consideration exists for the separation of the two estates, and the entire estate is liable for the lien.' "

In the fourth place, the landlord was in a very real sense a party to the bankruptcy proceedings. She was the owner of a majority of the claims. She was the owner of the fee simple title. She and her son were the majority stockholders in the bankrupt corporation, and she was busy throughout the proceedings cooperating with the Trustee to get racing dates. In such a situation, the adjudication of the Bankruptcy Court would be binding upon her under the rule laid down in *Wiswall* v. *Campbell.*

"In *Wiswall* v. *Campbell,* 93 U. S. 387, 23 L. Ed. 923, which involved an appeal by a rejected creditor, the court said:

> '* * * Every person submitting himself to the jurisdiction of the bankruptcy court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance subjects himself to the dominion of the Court and must abide the consequences.' "

"In 6 Am. Jur. (Bankruptcy) 590, Sec. 134, the following statement appears:

'The allowance or disallowance of claim is a judgment, entitled to full faith and credit, as any other judgment.

'Every person submitting himself to the jurisdiction of the bankruptcy court in the progress of the cause for the purpose of having his rights in the estate determined makes himself a party to the suit, and is bound by, what is judicially determined in the legitimate course of the proceeding. The referee's order of allowance or disallowance of a claim is *res adjudicata* in subsequent actions between the same creditor and the trustee. State courts are without power to review, revise, reverse, or collaterally attack a referee's order allowing a claim.' "

Appellant Is Estopped.

It would seem too plain for argument that appellant is estopped to take the position which it has, that it did not buy the leasehold estate, and that the Bankruptcy Court did not adjudicate Weed's claim. It is estopped not only by the record of the judgment in the case of *Bragg* v. *Gerstel, supra,* but also by the position which it took in the Court of Appeals in that case. It contended there that Weed had no right to appeal from the District Court's order to sell the assets of the bankrupt for $100,000, because he was a secured creditor and was not affected by the sale. A party taking such a position (and it might be mentioned here that appellant was represented by the same counsel in the Court of Appeals who represents it here) is estopped by the consequences of his action. In *United States National Bank* v. *Chase National Bank,* 331 U. S. 28, ... L. Ed. ....., 67 S. Ct. 1041, it was contended that certain claimants in a bankruptcy administration were not entitled to have their claims recognized, because the statutory provisions with respect to the filing of the proofs of claim had not been followed. It was contended that because of this deviation from the statutory requirements a waiver of

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liens had taken place. The chief contender for the waiver of the liens was the Chase National Bank, a general creditor whose attorney had proposed a plan, the operation of which it was claimed resulted in the waiver. As to this the Court said:

> "As the District Court noted, 61 Fed. Supp., at page 152, its counsel recommended and had full knowledge of the agreement; and Chase had knowledge of the subsequent dividend distributions, to which it did not demur. At this late stage, it is equitably estopped from raising any objection to the validity of the liens on the basis of the operation of the plan which it proposed."

CONCLUSION.

We respectfully submit that no Federal question is presented by this record and that the appeal should be dismissed. This Court is too important to be interested in the settlement of any but national controversies and the determination of far reaching principles of constitutional law. If there had in fact been a denial of procedural due process to the injury of the appellant, the relative insignificance of the controversy would not warrant the Court in deviating from the duty to see that the appellant had his day in Court. Such however is not the case. The appellant was afforded every opportunity to put on all of the testimony that it desired and it made no effort, although there were numerous and extended hearings to offer any testimony of any sort on the question which it now claims it was denied the right to litigate. This in itself should be sufficient to warrant a dismissal of the appeal.

However, under the common law, when the appellant acquired the fee simple title to the race track, it merged the greater and the lesser estates and thereby the adju-

dicated land against the leasehold immediately attached to the fee simple title. This is a common law principle that has long been recognized and presents in none of its aspects any question remotely concerning the operation of the Federal Constitution.

The lease between Broward Tomato Farm and Hollywood Jockey Club would, except for the actions committed by appellant and its predecessor in title, Mrs. Horning, have many years yet to run. The leasehold estate is a valuable property right against which Weed would have a plain right to proceed. By putting it beyond Weed's power to proceed now against the leasehold premises, appellant has certainly subjected the entire estate to the payment of the adjudicated claim.

Donn bought the assets of the bankrupt Jockey Club with full knowledge of all of the proceedings. He testified that he was in touch with Weed before the work was ever commenced, and he certainly knew or was charged with knowledge of everything that had been done in the case. He is simply trying to take the benefit of Weed's labors and to escape the consequences of having to pay for them. To hold that Weed must now go back and prove every item of labor and materials that went into the construction of this tract some 12 years ago, when the books of the corporation which reflect those items have in part been lost, would possibly be to deny to Weed any recovery at all. This is what the appellant is seeking. It is not seeking its day in court. It is seeking to keep Weed from collecting a just debt. Like the people who patronize a race track it is simply gambling, that if it can force Weed to prove the value of every item of labor and materials that went into the track, it will prolong the litigation to such an extent that either he will have to abandon it or will settle for ten cents on the dollar as other creditors were forced to do. Nor has there

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been any denial of procedural due process as a matter of law. Appellant was not denied a hearing in any sense of the word. It was given a hearing. What is now complained of is that the Supreme Court of Florida erred in giving greater effect to an adjudication than appellant thinks should have been accorded the judgment. But if this presents a Federal question, every decision of the State court would do the same, and this Court would simply become a general melting pot into which all of the alleged erroneous judgments of State Courts would be thrown, in an effort to extract the dross of error in the heat of argument.

The motion should be granted.

Respectfully submitted,

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